

Title Insurance - A Surveyor's Perspective

This article is a product of collaboration between the Public Awareness Committee, the AOLS Administration and Consultants. The Ontario Real Estate Lawyers' Association have circulated this article to over 800 lawyers' offices across Ontario. We have met with the Canadian Bar Assoc. of Ontario and we understand this article will be reprinted and circulated to their members.

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If left to grow unchecked, the title insurance industry has the potential to control completely most, if not all, of the mortgage and real estate transactions in Ontario. Will this be good for the province's home owners? The Association of Ontario Land Surveyors (AOLS) is very concerned.

The AOLS is the self-governing licensing body for the surveyors of Ontario. As with the Law Society of Upper Canada, one of the Association's prime mandates is public protection. It is this concern for the public that has the Association worried. Is the public buying into a product that they don't understand? Who's going to fully inform them?

• History of Title Insurance in the United States

Title insurance in the United States first came to be in the 1870s. Since then it has grown into a huge billion dollar industry. But why? Let's look at some facts.

First, the title records systems throughout most of the United States are far different than here in Ontario. There, they are only organized alphabetically making it virtually impossible to research the title for a particular parcel as is done on a regular basis in our system. As a consequence, the title insurance companies themselves are said to maintain better records than the official title records offices do.

Second, the planning for land development in the United States, (or perhaps the lack of planning) has not been nearly as involved as we have been used to in Ontario. As a result, the unorganized manner in which some parcels have been created in the United States, coupled with the poor title records systems, have established a convoluted system of land tenure that has required a title insurance industry to make it work.

In the 1970s, mortgages in the United States began to be sold in security pools. Soon the federal United States govern-

ment mandated that all mortgages offered in these security pools had to be protected by title insurance. This has since led to virtually all mortgages in the United States being protected by title insurance.

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It is felt that one of the reasons that the title insurance companies have come to Canada is because, in the 1980s, mortgages also began being sold here in large numbers through mutual funds. It is assumed that this has led the title insurance industry to hope that they will be able to repeat the type of success they realized in the United States.

• The Ontario System

By contrast, over the same period, the property owners of Ontario have enjoyed a system of title "assurance" provided by lawyers and surveyors that has protected them very well.

First, our title records system is, comparatively, world class. Our registry office records were organized on a geographical basis in 1867 making the individual lot the basis for recording documents. Add to this a system of "ruling out" discharged mortgages that has kept the records very clean, and you have a title records system that has proven to be very accurate and quite useable. As well, the northern portions of the province were organized in the Land Titles system from their very beginning where not just the lot but also the individual parcel (which may be only a portion of a lot) was the basis of document storage. By the year 2000, the province, through its Polaris program, plans to have every

parcel registered under the Land Titles System.

Second, Ontario has long enjoyed a planned approach to land development which has been made easier than in the United States because of a smaller population base.

The system of title "assurance" in Ontario has been provided by lawyers and surveyors over the years working together when a parcel is mortgaged or sold. The lawyer has used the title records system and other information systems to research the quality of title and the surveyor has coupled this research with a ground survey to verify the extent of title and, together, they have both provided the mortgage lender and the property owner with a comprehensive and complete opinion of what is being bought. This process has provided a "maintenance" factor to our title records system that has cleaned up many errors over the years. But that is not to say that the system is without errors today. They still exist. Lawyers and surveyors find them on a regular basis and through the natural purchaser/vendor process, these errors continue to be eliminated.

The title insurance firms want to change this process by removing the lawyer and the surveyor from the scene and, instead, replace them with an insurance policy that will mask over the errors that are inherent within the system. Again we ask, is this good for the property owners of Ontario or for the registration system that we now enjoy?

• How Title Insurance Will Affect Ontario

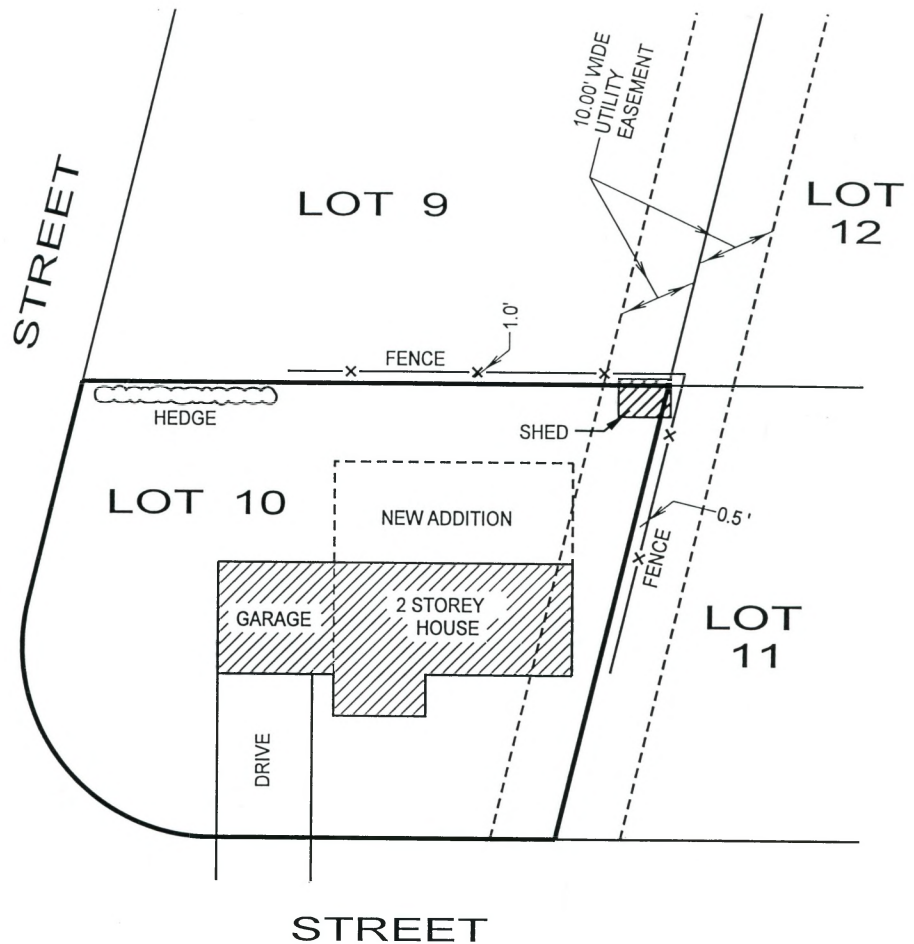
To provide title insurance to a lender and a borrower on the same parcel of land requires two separate policies - one for the lender and another for the borrower. The borrower's policy is optional. Upon examination of these policies it appears that the lender's policy is much simpler than the home owner's (borrower's) policy. For one, the lender's policy does not

require a survey on residential properties while the home owner's policy requires an up-to-date survey. If the new home owner chooses not to get one done, then matters that the survey would have revealed, such as an encroachment or a prescriptive easement right, will not be covered. Clearly then, in cases where the usual kind of title problems exist, the new home owner will probably be left holding the bag.

The title insurance system is set up to favour the lenders. Why? Because this is their target market that they want to capture. They really don't want to sell the home owners' policies because they will only lead to the nuisance claims. The lenders won't be as concerned about the nuisance items such as small boundary encroachments, minor variance infractions and prescriptive easements. After all their investment in the parcel is probably less than 75% of its value and declining with time. The lender is only interested in the marketability of the parcel, not the nuisance items that would concern the home owner. Who then, is going to inform the borrower of these facts? Will it be the lender, the title insurance company or a lawyer working for either the lender or the title insurance company? How many borrowers, of their own volition, will hire their own lawyer to investigate fully the title or hire their own surveyor to provide the up-to-date survey so that problems that are uncovered can be listed in the policy for their protection. We suggest that very few new home owners will go to this extent or will even understand the importance of it.

As an example, refer to diagram No. 1. Let us assume that the new purchaser of lot 10 used title insurance to protect his purchase. Let us further assume that he either only bought the lender's policy that did not require a survey, (we suggest that many purchasers will do this) or that he also bought the home owner's policy but did not choose to have an up-to-date survey done (as we suggest most of the rest of the purchasers will do). Continuing with this situation, let us go on to assume that the new purchaser, at some point in the future, decided to build a new addition to the house. At this point, he discovered that the municipality required a site plan of the property, including a boundary survey (which is a standard request these days). After he received the site plan and survey, the home owner

Diagram No. 1



then discovered, to his chagrin, that there was a 10 feet wide utility easement along one side of his lot onto which his house encroached. Not only that, but his utility shed completely encroached onto the easement and projected slightly over the lot limits as did his fences. He realized that before he could proceed with the new addition, he would have to remedy the encroachment problems.

Will the title insurance policy help the home owner in this case? We suggest that there is certainly some doubt that it will. We further suggest that if the home owner had chosen the traditional form of title "assurance", being a complete research of the title including the lawyer's opinion of the quality of title and the

surveyor's opinion of the extent of title, he would have been in a position, before closing the transaction, to either remedy the problems or to obtain an adjustment in the purchase price. He would then be satisfied, in his mind, that he owned the property free and clear of any hidden disasters.

After all, any person buying property in either the United States or Canada wants someone to assure them that there are no hidden problems with their purchase. Buying a home is the biggest investment that the average person makes. They don't want it ruined by unknown factors surfacing in the future that will affect the freedom of their ownership. Traditionally, in the United States, home

owners have bought this peace of mind with a title insurance policy. In Canada, it has been purchased through the services of a lawyer and a surveyor, backed up by the protection of their respective professional associations and the liability insurance funds and public compensation funds that both associations maintain.

The AOLS feels that, for the system that has developed in Ontario, the continued use of lawyers and surveyors not only better protects the home owner, but also continues to provide an inherent maintenance to our title records system that will further improve the accuracy and dependency of our title records as we move towards its complete automation and computerization.

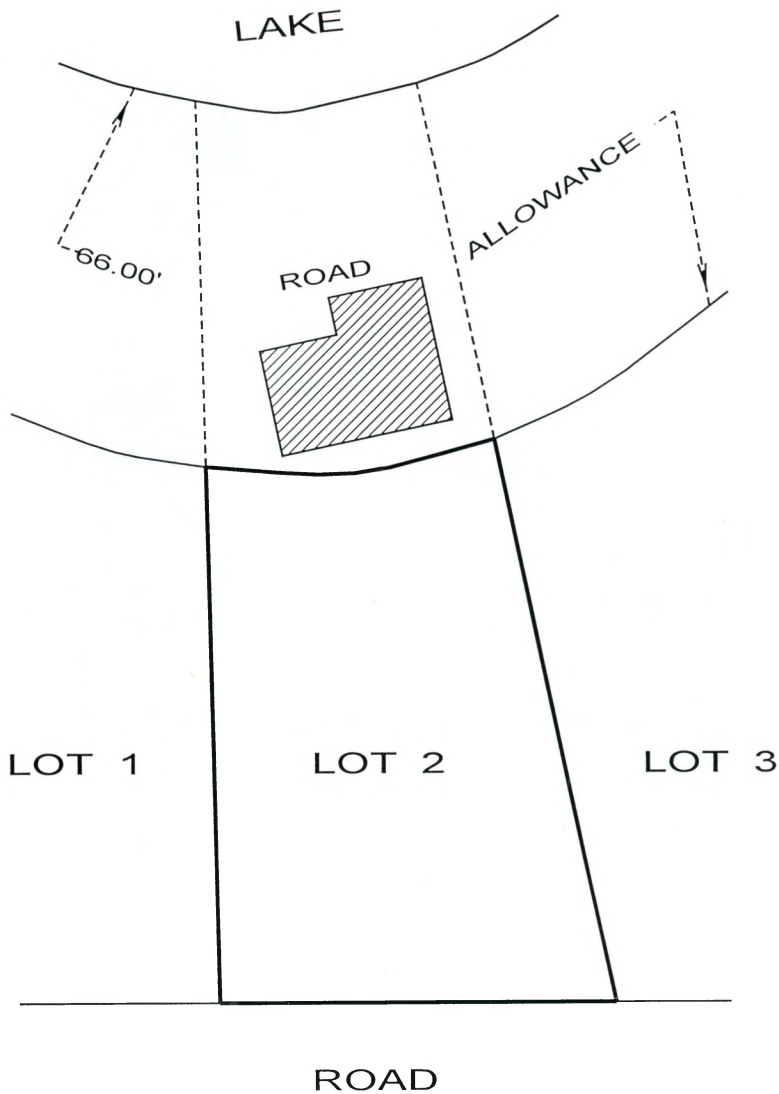
For another example, see diagram No. 2, put together from a situation laid out in the literature of one of the title insurance companies.

A purchaser has bought a cottage property along a lake that is described in her deed as Lot 2. She has bought a title insurance package offered by her lender and decided to also buy the home owner's policy but did not choose to have an up-to-date survey done. There were so many extra costs to this purchase that she decided to forego the added expense of the survey.

After she bought the property and had been enjoying the use of it for a few years, she received a letter from the Provincial Government notifying her that her cottage was on an unopened 66 foot wide road allowance that circled the lake. She was aghast because no one at the mortgage office, where she signed all of the papers, told her of the road allowance. She had assumed that her property went right down to the lake. After investigating the matter further, which included talking to a lawyer and a surveyor, she called her mortgage office to see how to make a claim against her title insurance policy.

In this situation, both the lender's policy and the home owners's policy contained a metes and bounds description of the property being insured that was taken from the deed. The description, therefore, simply read "Lot 2." But, the title problem existed completely within another parcel, being the neighbouring 66 foot road allowance. It raises the question of whether or not either the lender or the home owner will have a claim. Does a

Diagram No. 2



title insurance policy insure the "parcel" or only the lands described within this metes and bounds description?

We do not know the answer, but, again, we point out the doubt that exists with title insurance. And, again, we point out that, if the lender and purchaser had used a lawyer and surveyor to provide the traditional form of title "assurance", then the situation would have been discovered and there would have been an opportunity to clean it up before the transaction was completed.

These two examples show the concern that the AOLS has for the home owners of Ontario. The title insurance companies are encouraging the use of title insurance as a replacement for most

of the work that a lawyer does in a mortgage and real estate transaction and as a total replacement for a survey on residential properties. We do not believe that this serves the people of Ontario or our advanced title records system well. Title insurance may have a place in mortgage and real estate transaction procedures but we don't feel that this should be as a replacement for our traditional system of title "assurance" that lawyers and surveyors have provided over the years and continue to provide.

We hope that lawyers will join us as we bring this message to the public, the lenders and the legislators of Ontario.

